

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

50976

FILE: B-182961

DATE: August 14, 1975

MATTER OF: Memorex Corporation

97490

## DIGEST:

1. Requirement of FPMR 101-32.405(2)(1) that offerors be notified of date and time that negotiations are to be terminated is satisfied by RFP's Master Terms and Conditions which indicate that "close of negotiations" is date and time established for receipt of proposals as stated in RFP unless negotiations are reopened by written notice from contracting officer. Since negotiations were never formally reopened, there exists no basis upon which to determine that negotiations were improperly terminated.
2. Determination of Export-Import Bank that proposed ADPE was unacceptable due to spacial limitations was unreasonable, and therefore, GSA's subsequent actions in reliance on determination were prejudiced thereby. Therefore, recommendation is made that contracting officer, based upon information contained in decision, determine feasibility of breaking out item 3 from Lot #1 and if affirmative determination is made, requirements should be resolicited and procurement should proceed in accordance with FPMR Temporary Regulation E-32.
3. Rejection of proposal submitted in response to RFP as "non-responsive" is inappropriate when used in context of negotiated procurement.

Memorex Corporation has protested to our Office the determination that its proposal, submitted in response to request for proposals (RFP) No. CDPR 5-67 issued by the General Services Administration (GSA), was nonresponsive. It has also protested the decision not to make any award under the RFP.

On October 2, 1974, GSA issued the RFP in question to various suppliers of automated data processing equipment (ADPE). The RFP called for the acquisition of an IBM 370/135 data processing system to replace a comparable system leased from IBM at the Export-Import Bank (Ex-Im). The RFP was issued in light of Federal Property Management Regulation (FPMR), Temporary Regulation E-32, dated June 28, 1974, which stated at section 5 that,

"Background. Changes in the marketplace have made it practicable in some cases to obtain competition on the Government's requirements for certain ADPE normally included on GSA's annually negotiated noncompetitive ADP Schedule contracts. To capitalize on this competitive environment and to implement the recent GAO recommendations relative to the competitive acquisition of ADPE, limitations are being placed on the use of ADP Schedule contracts. These limitations are designed to insure maximum practicable competition in the procurement of such equipment. \* \* \*"

Section D of the RFP contained a list of desired equipment and identified each unit comprising the system by providing a model/feature number and a brief description of the components. Paragraph 6 of Section D stated that,

"Award shall be made on individual lots or combinations of lots which yield the lowest Total overall cost to the Government for all lots.  
\* \* \*"

GSA, in its report to our Office on the protest, noted that "The various lot groupings were developed after consideration of such things as: "combining like items, maintaining compatibility between the numerous control units of the system and their associated peripherals and maximizing competition amongst the many ADPE suppliers, many of which could only supply a portion of the system." Lot #1, the lot pertinent to Memorex's protest, included items 1, 2, 3, 11, 12 and 13.

In response to the RFP, Memorex submitted its proposal which sought to break out item 3 from Lot #1. In a cover letter to its proposal, Memorex stated that:

"\* \* \* \* \*

"Memorex can meet all of the requirements \* \* \*  
except for bidding all of Lot Number 1, since

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the CPU and Console Printer are mixed with the Disc Drives.

"\* \* \* \* \*

"In our conversation of October 16, 1974, concerning the above, you mentioned that \* \* \* you would make an effort to break out the components of Lot #1.

"In our meeting Friday, October 18, 1974, you stated that due to your heavy personal workload and the assumption of Mr. Toth's workload as well, you were unable to create an amendment concerning Lot #1. You concurred that Memorex should submit an alternate proposal based upon the circumstances stated above."

Apparently as a result of Memorex's proposal, GSA requested that Ex-Im consider the feasibility of accepting the ADPE Memorex proposed to supply. In response, Ex-Im, by letter dated November 12, 1974, took the position that while the Memorex ADPE would be technically acceptable, the equipment would occupy substantially more lateral space than the present IBM equipment, and that the computer room was already overcrowded. Therefore, Ex-Im indicated that it could not accept the Memorex equipment.

Based on the Ex-Im letter, the RFP was never formally amended to break out the components of Lot #1 as suggested by Memorex. By letter dated December 20, 1974, Memorex was formally notified that its offer to supply item 3 only of Lot #1 was nonresponsive to the terms of the RFP. Also, by letter dated December 20, 1974, Ex-Im was informed that the lowest responsive offer received under the RFP was an alternate proposal from IBM with price offerings no better than existing ADP Schedule prices. Accordingly, no award was made under the RFP and Ex-Im has continued to lease its ADPE from IBM.

Although Memorex sought to rectify the above situation through a meeting with representatives of GSA, its efforts were

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unsuccessful, thereby resulting in its filing of this protest with our Office.

Initially, Memorex has contended that GSA did not comply with FPMR 101-32.405(2)(1) which requires that offerors be notified of the date and time that negotiations are to be terminated. GSA, on the other hand, has cited paragraph 4 E.d. of Part II entitled "Application" of the Master Terms and Conditions which states that,

"For purposes of these Master Terms and Conditions, the 'close of negotiations' shall be defined as the date and time certified for receipt of proposals/offers as determined in accordance with paragraph a. above. The Contracting Officer by written notice may re-open negotiations at any time in which case a new time for 'close of negotiations' will be established."

and reasons that since there was no written notice issued to reopen negotiations, negotiations were officially closed at 3:00 p.m., October 23, 1974, in accordance with the above-cited provision.

From the record before our Office, we can find no evidence to indicate that negotiations were ever formally reopened after October 23, 1974. Therefore, there exists no basis upon which we can determine that negotiations were improperly terminated.

Memorex has further contended that GSA has inappropriately found its proposal to be nonresponsive. GSA's letter of December 20, 1974, stated that,

"\* \* \* your alternate proposal offering Memorex plug-to-plug compatible equipment was considered non-responsive. Line items 1, 2 and 3 were grouped into Lot #1 for award purposes. Your proposal offered Line Item 3 only."

It is Memorex's position that GSA improperly refused to break out item 3 from Lot #1, thereby resulting in the December 20 letter.

To specifically summarize the events between October 23 and December 20, 1974, after receipt by GSA of Memorex's proposal

GSA requested that Ex-Im comment on the feasibility of its replacing its current 3333/3330 IBM disc drive with Memorex 3673/3670 units. By letter dated November 12, 1974, Ex-Im responded that the technical specifications and capabilities of the Memorex units were acceptable, but that the Memorex units occupy substantially more lateral space than the IBM units. Ex-Im stated that since its computer room was already overcrowded, with no possibility of expansion, it could not accommodate the Memorex units. In an attempt to resolve the difficulties surrounding Ex-Im's space limitations, Memorex, with Ex-Im's permission, analyzed Ex-Im's computer room to determine if the Memorex units would fit. Although Memorex orally informed Ex-Im that the Memorex units would fit into the existing computer configuration, Ex-Im would not alter its position. Based upon this negative recommendation, GSA made no decision as to the feasibility of breaking out item 3 from Lot #1 and thereupon found Memorex's proposal to be nonresponsive to the RFP.

From the record before our Office, and particularly Memorex's December 23, 1974, letter to the contracting officer, it appears that Memorex has at all times stood ready, willing and able to demonstrate both the acceptability of the units offered and the configuration flexibility to the mutual satisfaction of all parties concerned. However, such demonstrations were never requested by either GSA or Ex-Im. We also note at this point that nowhere in the RFP were dimensional specifications included nor were offerors informed that units exceeding certain dimensions could not be considered for award purposes.

For the reasons that follow, we disagree with the underlying basis upon which the contracting officer determined not to break out item 3 from Lot #1. As stated above, Ex-Im responded to GSA by stating that Memorex's proposed units would not fit into its computer room configuration. Upon further refinement of this issue during the course of the protest, Ex-Im, by memorandum dated June 23, 1975, has expressed its spacial problem as follows,

"SUBJECT: Memorex 3673 and 3670

"Comparison on physical size (3673):

1. 2" higher than working tapes cabinet.
2. 13" increase in depth
3. 0" difference in length as compared to operations run books cabinet.

"Two major problems (3673):

1. 13" of aisle space is lost between current configuration and proposed. The present design allows two people to pass between the operation run books and the 2540. However, the proposed plan would only allow enough space for one (1) person to pass thru at a time. This would create traffic problems with two or more operators or people in the computer room.
2. Relocating the operation run books by the 3670 disk drive reduces the operators efficiency. Access to these manuals is required for every job run. Placing them by the 3670 increases the amount of time required to look-up job set-up instructions and reduces the streamlining of the overall work flow."

Memorex, in rebuttal to Ex-Im's above memorandum, has stated,

"Eximbank point number one:

"Considering the substantial savings Memorex will provide Eximbank, how can any Government Agency justify the requirement or better still, the luxury, of two people crossing the same spot at the same time?

"Eximbank point number two:

"The IBM 370/135 Processor was designed with a table that covers the front of the processor and extends to the console typewriter, providing operator efficiency while referring to computer run books. The storage of run books is no different than the requirement to store disc packs or computer tapes and should not be confused with the fact that when in use, a place was provided with operator efficiency."

The question of spacial limitations has been before our Office in the past. See 51 Comp. Gen. 247 (1971); Shrink-O-Matic, Inc., B-181555, January 16, 1975. Previously our Office has examined specification requirements to determine if they represented a valid and reasonable restriction on competition. This was done with a view to our often-stated position that specifications should be drawn to maximize competition, B-178158, May 23, 1973; B-172006, June 30, 1972, and that we will not interpose our judgment for that of the agency's even when competition is reduced " \* \* \* unless there is clear and convincing evidence that the agency opinion is in error and that a contract awarded on the basis of such specifications would, by unduly restricting competition \* \* \*, be a violation of law." Winslow Associates, 53 Comp. Gen. 478 (1974); 40 id. 156 (1969) and 17 id. 554 (1938).

Our opinion regarding the matter of spacial limitations in this procurement, based not only upon a review of the arguments presented, but also upon a thorough examination of the detailed computer room configurations, is that the Ex-Im position regarding the need for the extra 13 inches of aisle space and more closely placed operator-run books is unreasonable, and therefore, an improper restriction upon competition. Whereas the aisle, as it presently exists, is approximately 3 feet wide, we find no basis in the record that would proscribe an aisle approximately 2 feet wide. The area in question does not appear to be an exceptionally heavy traffic area nor is this location in close proximity to either entranceways or emergency exits.

In view of the above conclusion, we must further conclude that Ex-Im's November 12, 1974, letter to GSA was erroneous and that the results that flowed therefrom were prejudiced thereby. Accordingly, the question now for resolution is what relief, if any, would be appropriate. We note from the record that in view of the prices offered under the RFP, no award was made and Ex-Im has continued to lease the equipment from IBM. Therefore, it is our opinion that it would not be prejudicial to any party to have GSA, based upon the information contained in this decision, make a determination concerning the feasibility of breaking out of item 3 from Lot #1. Should GSA determine that it would be in the best interest of the Government to break out item 3, the requirements should be resolicited and the procurement should proceed in accordance with FPMR Temporary Regulation E-32.

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Finally, we note that the concept of responsiveness is not applicable to negotiated procurements. See Linolex Systems, Inc., 53 Comp. Gen. 895, 897 (1974); Unidynamics/St. Louis, Inc., B-181130, August 19, 1974.

  
Deputy Comptroller General  
of the United States